Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–357 OF 1997
ABDUL HAMID MOHAMAD, KC VOHRAH AND ALAUDDIN JJCA
13 JUNE 2002

Family Law *— Matrimonial property — Division of assets — Apartment bought by husband as an investment — Shortfall in rental of apartment — Whether husband to pay 'occupation rent' — Income husband derived from medical clinic — Whether to be apportioned to wife — Correct approach to be taken by the court — Law Reform (Marriage and Divorce) Act 1976 s 76*

This was an appeal by the appellant ('the husband') against an order of court made in divorce proceedings regarding the division of matrimonial assets. The division of assets concerned an apartment bought in the name of the husband and the income earned by him from a medical clinic. The parties were married on 1 May 1983. They separated on 27 October 1990. A decree nisi was issued on 17 September 1993 and was made absolute on 9 May 1994. The apartment in question was purchased in January 1990 and was rented out up to September 1993. The total amount of rent earned was RM85,900 but only RM45,700 was credited into the bank account and used for the payment of loan installments, leaving a shortfall of RM40,200 ('the shortfall'). From October 1993 to April 1997 — a period of 44 months — the husband lived alone in the apartment. The loan outstanding on the apartment at the time of trial was RM90,000. The husband challenged the decision of the High Court which, inter alia, ordered: (i) that the apartment be valued and after deduction of the redemption sum, the respondent ('the wife') be awarded one half of the value in cash; (ii) that the husband pay the wife half the shortfall; and (iii) that the husband pay the wife half the total rental for the period the husband stayed in the apartment ('occupation rent'), until such time the apartment is valued and the wife be given her half share. The husband also appealed against the order at the High Court that one third of the net income supposedly earned by the clinic be awarded to the wife.

Held, allowing the appeal in part and making consequential orders:

(1) There is no decided case to support an accounting of all the assets acquired or improved during the marriage and the income thereof and the determination of who had benefited more or less and awarding a shortfall to the party found to have benefited less. Section 76 of the Law Reform (Marriage and Divorce) Act 1976 talks of 'division' of assets acquired during the marriage and provides the factors that should be taken into account when making the division. The function of the court is to make a fair and equitable division of the matrimonial assets that exist

at the time of the divorce, taking into account the factors provided by s 76 (see p 279D–F, I).

(2) The order of the High Court that the apartment be valued and that after deducting a sum of RM90,000, the balance be divided equally and half of it be paid in cash to the wife should be confirmed. However, it is incorrect that the rental shortfall be awarded as a separate award. There should also not be a separate award for occupation rent prior to the dissolution of the marriage. Half the occupation rent from the date of the dissolution of the marriage until the wife's half share of the value of the apartment is paid in full to her, must be paid to the wife (see p 284A–B, D).

(3) The income, expenses and the net income the husband supposedly earned per year was no more than an arbitrary figure. Further, it could not be denied that the income earned from the clinic had been spent and enjoyed by the family even though no one knew how much or in what proportion. In the circumstances, the correct approach is to divide the assets and not to apportion past income. The clinic including all equipment and goodwill should be valued and one third of the value paid in cash to the wife (see p 285C, E–F).

Obiter:

The courts in this country should not treat such a relationship as in *Dennis v McDonald* [1981] 2 All ER 632 as a 'matrimonial relationship'. There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either married or not married. There is nothing in between. A marriage is either monogamous or polygamous. There is nothing in between. A Muslim marriage is polygamous. A non-Muslim marriage contracted after the coming into force of the Law Reform (Marriage and Divorce) Act 1976 is monogamous. The principle in *Dennis v McDonald* should not be applied to unmarried couples in Malaysia. The terms 'matrimonial relationship', 'matrimonial home', 'conjugal rights', 'matrimonial proceedings' or 'division of matrimonial assets' are terms exclusively for lawfully married couples (see pp 280F–G, 281G-H).

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh perayu ('suami tersebut') terhadap satu perintah mahkamah yang dibuat dalam prosiding perceraian berhubung pembahagian aset-aset suami-isteri. Pembahagian aset-aset adalah berkaitan sebuah apartmen yang telah dibeli atas nama suami dan pendapatan yang diperolehi oleh suami tersebut daripada sebuah klinik perubatan. Pihak-pihak tersebut telah berkahwin pada 1 Mei 1983. Mereka telah berpisah pada 27 Oktober 1990. Satu dekri nisi telah dikeluarkan pada 17 September 1993 dan telah dijadikan

A mutlak pada 9 Mei 1994. Apartmen yang dipersoalkan telah dibeli pada bulan Januari 1990 dan telah disewakan sehingga bulan September 1993. Jumlah sewa yang telah diperolehi adalah RM85,900 tetapi hanya RM45,700 telah dikreditkan ke dalam akaun bank dan digunakan untuk pembayaran ansuran-ansuran pinjaman, yang mana meninggalkan kekurangan sebanyak RM40,200 B ('kekurangan tersebut'). Daripada bulan Oktober 1993 hingga April 1997 — satu tempoh selama 44 bulan — suami tersebut telah tinggal bersendirian di apartmen tersebut. Pinjaman yang masih belum jelas ke atas apartmen tersebut pada waktu perbicaraan didapati sebanyak RM90,000. Suami tersebut telah mencabar keputusan Mahkamah C Tinggi yang, antara lain, telah memerintahkan: (i) bahawa apartmen tersebut hendaklah dinilai dan selepas menolak jumlah penebusan, responden ('isteri tersebut') diawardkan setengah daripada nilainya dalam bentuk wang tunai; (ii) bahawa suami tersebut membayar kepada isteri tersebut setengah daripada kekurangan tersebut; dan (iii) bahawa suami tersebut hendaklah membayar kepada isteri D tersebut setengah daripada jumlah sewa bagi tempoh suami mendiami di apartmen tersebut ('sewa penghunian') sehingga satu masa apartmen itu dinilaikan dan isteri diberikan setengah bahagiannya. Suami tersebut juga telah merayu terhadap perintah Mahkamah Tinggi bahawa satu per tiga dari pendapatan bersih yang dijangkakan diperolehi oleh klinik tersebut diawardkan kepada isteri tersebut.

E

Diputuskan, membenarkan sebahagian rayuan tersebut dan membuat perintah-perintah sampingan:

(1) Tidak terdapat kes yang telah diputuskan bagi menyokong perakaunan kesemua aset-aset yang diperolehi atau yang F ditambah ketika perkahwinan dan pendapatan daripadanya serta penentuan siapakah yang telah mendapat manfaat yang lebih atau yang kurang dan mengawardkan kekurangannya kepada pihak yang didapati telah mendapat manfaat yang kurang. Seksyen 76 Akta Membaharui (Perkahwinan dan Perceraian) 1976 memperkatakan mengenai 'pembahagian' aset-aset yang G diperolehi ketika perkahwinan dan memberikan faktor-faktor yang harus diambilkira ketika membuat pembahagian tersebut. Fungsi mahkamah adalah untuk membuat suatu pembahagian yang adil dan saksama akan aset-aset suami-isteri yang ada pada waktu perceraian, dan mengambil faktor-faktor yang diberikan H oleh s 76 (lihat ms 279D–F, I).

(2) Perintah Mahkamah Tinggi bahawa apartmen itu hendaklah dinilai dan bahawa selepas menolak jumlah sebanyak RM90,000, bakinya hendaklah dibahagi sama dan setengah darinya hendaklah dibayar kepada isteri dalam bentuk wang tunai patut disahkan. Walau bagaimanapun, ia adalah tidak betul bahawa I kekurangan sewaan diawardkan sebagai satu award yang berasingan. Tidak juga seharusnya terdapat satu award berasingan untuk sewaan penghunian sebelum pembubaran perkahwinan.

Setengah daripada sewaan penghunian daripada tarikh pembubaran perkahwinan tersebut sehingga setengah bahagian isteri daripada nilai apartmen itu yang dibayar sepenuhnya kepadanya, mestilah dibayar kepada isteri (lihat 284A–B, D).

(3) Pendapatan, perbelanjaan dan pendapatan bersih yang suami dijangkakan perolehi setahun adalah sebenarnya satu angka arbitrari. Selanjutnya, adalah tidak dapat dinafikan bahawa pendapatan yang diperolehi daripada klinik tersebut telah dibelanjakan dan dinikmati oleh keluarga meskipun tidak siapa mengetahui berapa banyak atau dalam bahagian yang berapa yang telah dibelanjakan. Dalam keadaan tersebut, pendekatan yang betul adalah untuk membahagikan aset-aset tersebut dan tidak membahagikan pendapatan yang lalu dengan adil. Klinik termasuk kesemua peralatan dan nama baik seharusnya dinilai dan satu per tiga dari nilainya dibayar kepada isteri dalam bentuk wang tunai (lihat ms 285C, E–F).

Obiter:

Mahkamah-mahkamah di negara ini tidak sepatutnya menganggap satu hubungan seperti dalam *Dennis v McDonald* [1981] 2 All ER 632 sebagai satu 'hubungan perkahwinan'. Perlu terdapat satu perkahwinan yang sah di bawah undang-undang Malaysia yang terpakai terhadap satu pasangan sebelum boleh terdapat apa-apa hubungan perkahwinan. Dalam negara ini, seseorang adalah sama ada berkahwin atau tidak berkahwin. Satu perkahwinan adalah sama ada monogami atau poligami. Tiada apa-apa di antaranya. Satu perkahwinan Muslim adalah poligami sementara satu perkahwinan bukan Muslim yang terikat selepas penguatkuasaan Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 adalah monogami. Prinsip dalam *Dennis v McDonald* tidak sepatutnya digunakan ke atas pasangan-pasangan yang belum berkahwin di Malaysia. Terma-terma 'hubungan perkahwinan', 'rumah perkahwinan', 'hak-hak suami isteri', 'prosiding perkahwinan', atau pembahagian asset-aset perkahwinan' adalah terma-terma yang khususnya digunakan untuk pasangan-pasangan yang telah berkahwin dengan sah (lihat ms 280F–G, 281G-H).]

Notes

For cases on division of assets, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3135–3141.

Cases referred to

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109 (refd)

Dennis v McDonald [1981] 2 All ER 632 (refd)

Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene [1995] 1 MLJ 115 (refd)

A *Usha Rani a/p Subramaniam v Sivanes Rajaratnam* [1998] 5 MLJ 24 (refd)

Legislation referred to

B Law Reform (Marriage and Divorce) Act 1976 ss 47, 76

Appeal from: Divorce Petition No S2–33–250 of 1993 (High Court, Kuala Lumpur)

Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the appellant.
C *Jadadish Chandra* (*Arbain & Co*) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): In this judgment, the respondent (husband) in the High Court proceeding will be referred to as 'the appellant' and the petitioner (wife) in the High Court will be referred to as 'the respondent'. They are both medical doctors. They
D were married on 1 May 1983. They were separated on 27 October 1990. A decree nisi was issued on 17 September 1993 and was made absolute on 9 May 1994.

This appeal is against the order of the court regarding the division of their matrimonial assets.

E At the time of the marriage, both parties were employed as medical doctors at the Mentakab District Hospital. After two years of marriage, the appellant resigned from government service and joined a group practice in Shah Alam. They set up their matrimonial home in Shah Alam, at a rented house. During that period, the respondent (wife), travelled from Mentakab to Shah Alam during weekends. Shortly thereafter, she joined the Keretapi
F Tanah Melayu ('KTM'). She was given quarters at Kenny Hills. However, they continued to live at the rented house in Shah Alam. The KTM house was occupied by the respondent's parents for about nine months. In December 1986, the parties used the KTM house as the matrimonial home until their separation in October 1990.

G On 21 August 1987, the appellant opened a clinic at No 43, Jalan Silang, Kuala Lumpur under the name of 'Klinik Inter-Med'. However, the respondent remained in the KTM service, in view of the stable income and the benefits of housing and its free maintenance. In early 1990, the appellant purchased a property, the Crescent Court Apartment for RM117,000.

H The terms of the order made by the learned judicial commissioner (as he then was) on 12 May 1997, are as follows:

(1) that the apartment be valued by a qualified valuer to be agreed by the parties and after deduction of the redemption sum of RM90,000, the respondent is awarded one half of the value in cash;

I (2) that the appellant do pay the respondent RM20,100 together with interest at 4% pa from October 1992 to 12 May 1997, being one half of the rental shortfall;

(3) that the appellant pay the respondent RM43,000 being rental due to the respondent from 1 October 1993 until to date and still continuing until such time as the said property is valued and the respondent given her half share;

(4) that the appellant do pay the respondent RM1,133 from the Maybank Savings Account;

(5) that, within seven days of the date of the order, the appellant nominate the sole daughter of the marriage, Shaleen d/o Sivanes, as sole beneficiary of the two Great Eastern Life Assurance insurance policies; and

(6) that the appellant pay the respondent RM200,000 being the respondent's entitlement to $^1/_3$ of the income from Klinik Inter-Med.

Before us, learned counsel for the appellant challenged items (1), (2), (3) and (6).

However, before dealing with each of the items challenged, there is one general argument that has to be considered first. Learned counsel for the appellant argued that the approach of the learned judicial commissioner (as he then was) was wrong. The learned judicial commissioner (as he then was), especially in awarding the rental shortfall (item (2)), occupation rent (item (3)) and one third share of the income of Klinik Inter-Med (item (6)) had contravened the provisions of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). He argued that that section envisaged the division of assets acquired during the marriage and available at the time of the divorce, not the division of past income which was no longer available for distribution at the time of the divorce. He submitted that it was wrong for the court to 'do an accounting between the parties' as in the case of, say, two partners in a partnership business in a civil suit. The division of matrimonial assets in a divorce petition is governed by s 76 of the Act, he submitted.

I find this a very interesting argument. Section 76 of the Act provides:

Power for court to order division of matrimonial assets

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by sub-s (1) the court shall have regard to —

(a) the extent of the contributions made each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the

A marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by sub-s (3) the court shall have regard to —

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

B (b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case, the party by whose effort the assets were acquired shall receive a greater proportion.

C

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by joint efforts.

D From the authorities referred to us by both learned counsel and from my research, as far as I can ascertain, I am unable to find any decided case in Malaysia and Singapore to support an accounting of all the assets acquired or improved during the marriage and the income thereof and the determination of who had benefitted more or less and awarding a shortfall to the party who is found to have benefitted less. All the cases simply talk E about the 'division' of the matrimonial assets, which necessarily means the existing assets at the time of the divorce. Of course, the question of the size and nature of each spouse's contribution and who has enjoyed the property to the exclusion of the other (for example, as in this case, where only one party lived at the Crescent Court Apartment) and the reasons why, are relevant in determining the portion that each spouse should get, but not, in F my view, for the purpose of calculating either spouse's share of past income.

This view, in my opinion, is consistent with the wording and spirit of s 76 of the Act. That section talks of 'division' of assets acquired during the marriage and provides the factors that should be taken into account when making the division.

G Besides (I am speaking generally here) in a marriage, both spouses share everything, both contribute towards the home and family in one way or another, to a bigger or smaller extent. Where both spouses work and earn income, each of them inevitably spends his or her own income for the family. Similarly, where there is income from an asset purchased during the H subsistence of the marriage, say rent, even though it may be paid into the account of one spouse, eventually it will go to the family, may be all and may be part of it. No one keeps an account, indeed no one should, as a marriage is not a business venture.

So, if and when the marriage breaks up, it is unreasonable that the court should undertake an accounting of their income and expenditure during the I period the marriage subsists. The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into account the factors provided by s 76 of the Act.

Further, in making the division, Malaysian courts should pay special attention to the provision of the Act and not to rely uncritically on decided cases from other jurisdictions, except, perhaps, Singapore where the relevant law is similar. To rely uncritically on English cases, in my view, is not advisable. The case of *Dennis v McDonald* [1981] 2 All ER 632 for example, is a case concerning an unmarried couple with children born out of wedlock. Yet the court in England referred to the relationship as a 'matrimonial relationship'. Our own High Court too has referred to it in *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115 and also in this case.

I would like to reemphasize what this court has said through Mahadev Shankar JCA in *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 at p 122:

> Two points should now be made. The first is that whilst s 47 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') refers to English principles we should always keep in the forefront of our minds that when the Act was first initiated we were breaking new ground. It was then necessary to look to English case law because we had adopted much of the wording of the corresponding English statute. In the two decades which have since passed, we have injected enough local experience into the application of the provisions of Pt VI of the Act to become acutely aware that the differences between social and cultural aspirations with regard to marriage, divorce and welfare in England and Malaysia are such that much caution is called for before we adopt modern English attitudes. The measures we should take today to preserve the integrity of the Malaysian family when it is threatened by the calamity of divorce must be determined in the light of the Malaysian conditions. At best, therefore the English reports should only be regarded as being of persuasive value or as case studies why the family as unit is progressively disintegrating in that country where one parent households and unmarried mothers now number at least three out of ten.

I am of the view that the courts in this country should not treat such a relationship as in *Dennis v McDonald* as a 'matrimonial relationship.' There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either married or not married. There is nothing in between. A marriage is either monogamous or polygamous. There is nothing in between. A Muslim marriage is polygamous. A non-Muslim marriage contracted after the coming into force of the Law Reform (Marriage and Divorce) Act 1976 is monogamous. It cannot be both monogamous and polygamous. The line dividing the two is clear.

I shall now deal with the specific issues in this case.

The Crescent Court Apartment

The apartment was purchased in January 1990 in the appellant's name for RM117,000. At the time of the proceeding in the High Court, it was worth about RM210,000. The appellant paid RM24,000. This amount came from their joint account. He also withdrew RM12,700 from his Employees

Provident Fund (EPF) for the purpose. As found by the learned trial judge, the appellant obtained a loan of RM93,000. A sum of RM25,000 to RM30,000 was spent on renovations. The apartment was rented out at RM1,600 per month for one year and at RM2,300 up to September 1993. The total amount of rent was RM85,900 which should have been credited to the Citibank account. However, only RM45,700 was credited, leaving a 'shortfall' of RM40,200. The apartment was untenanted for three months, that is, from September to November 1993. From December 1993 to April 1997, the appellant was living in the apartment, a period of 41 months. The learned trial judge also found that the final redemption sum (outstanding loan) was RM90,000.

The learned judicial commissioner (as he then was) found that the apartment was bought as an investment and it was bringing rental which was being paid towards the loan. The apartment was not a matrimonial home. The respondent never lived in the apartment nor did she leave it voluntarily or otherwise. The learned judicial commissioner (as he then was) then went on to say at p 36 in the High Court decision of *Usha Rani a/p Subramaniam v Sivanes Rajaratnam* [1998] 5 MLJ 24:

> The principles of equity referred to in *Dennis v McDonald* must apply and it is inequitable for the respondent (appellant) to live rent free in the apartment bought solely for investment purposes. It is unacceptable for the respondent (appellant) to suggest that the petitioner ought to have herself stayed in the apartment when she already had a home to stay in and when she knew that the apartment was bought as an investment.

The learned judicial commissioner (as he then was) then ordered that the apartment be valued by a qualified valuer to be agreed to by both parties and the sum of RM90,000 (the redemption sum) to be deducted from the said valuation and the respondent be entitled to half the balance in cash.

First, I have no reason to interfere with the finding of facts by the learned judicial commissioner (as he then was) as narrated above.

Secondly, in spite of what I have said earlier, on the facts of this case where the parties were lawfully married, I have no objection to the principle in *Dennis v McDonald* being applied in this case provided it is understood that, I am in no way recognizing 'live in' relationship as a 'matrimonial relationship' with rights and obligations provided by law to a married couple, no matter how many children they may have together. In other words, the principle in *Dennis v McDonald* should not, in this country, be applied to unmarried couples. If a couple chooses not to get married as provided by our law, they should not be talking about a 'matrimonial relationship', 'matrimonial home', 'conjugal rights', 'matrimonial proceedings' or 'division of matrimonial assets'. Those terms are exclusively for lawfully married couples in accordance with our laws.

Thirdly, I take into account the fact that only the appellant had lived in the apartment (a matrimonial asset, not a matrimonial home) as a factor in considering the portion that the respondent (wife) is entitled to, not for the purpose of doing an account of past rents and ordering a 'shortfall' to be made good.

It cannot be denied that the respondent is entitled to a share of the Crescent Court apartment. The question is how much. In determining how much, we are governed by the provisions of s 76 of the Act. That is the primary law. And, like any law, it can only be worded in general terms. It is for the court to determine, guided by the principles laid down in the section and based on the facts of each case, how much is the fair and reasonable portion each party is entitled to. Of course, the court should also take into account the decided cases, especially of the more superior courts of this country and, in this case also of Singapore, the relevant written law of which is similar to ours.

In this case, as far as direct financial contribution of the respondent is concerned, her contribution came from the 'joint account' of RM24,000 used to pay the down payment. Even if her share is taken to be half, it is only RM12,000 of the total purchase price of RM117,000 which is about 10%. But I agree that this is not the only factor that should be taken into account.

What were her other contributions towards the purchase and improvement of the asset? First, the renovation, the total cost of which is between RM25,000 to RM30,000. Where did the money come from? There is no evidence that she contributed any part of it. Her only 'contribution' is that she 'did the major *supervisions*'.

Secondly, the fact that the apartment was rented. Out of the total rents earned RM45,000 was credited to the Citibank account and used for the settlement of the loan. RM40,000 was not credited. The learned judicial commissioner (as he then was), at first, at p 36 of his grounds of judgment in *Usha Rani a/p Subramaniam v Sivanes Rajaratnam*, said:

> To my mind, this shortfall should be disregarded because although the rentals were to be paid towards the loan and yet not paid, however in any case, the respondent had been settling the loan. In the circumstances, I made no award with regard to this claim for rentals by the petitioner.

However, on the following day the learned judicial commissioner (as he then was) vacated the order. His subsequent order appears at p 37 of his grounds of judgment. In this new order, he made a separate award in respect thereof. He divided the 'shortfall' of RM40,200 into two and granted the respondent half the amount, which is RM20,100 as a separate award. His reasons are first, the respondent 'ought to have credited the 'shortfall' but did not and secondly, because 'credit for the redemption sum has already been given.'

I agree that the 'shortfall' should be taken into account, but for the purpose of determining the portion of the contribution, not as in a claim for damages in civil suits. The court is dividing a 'matrimonial asset' not assessing damages.

It should also be noted that even though that 'shortfall' was not credited to the account and used for the payment of the loan installments, clearly the installments were being paid, otherwise the bank would have instituted proceedings in respect of it. Payment for assessment, quit rent and may be repairs will have to be made. The family too, in some way, may have

benefitted from the 'shortfall'. Of course, we do not know much. But the court is not required to do an accounting.

Next comes the 'occupation rent'. The appellant alone lived in the apartment from 1 October 1993 until 1 June 1997, a period of 44 months. The learned judicial commissioner (as he then was) ordered that half the 'rental' per month be paid to the respondent. The final figure found by the learned judicial commissioner (as he then was) is RM43,100 and the order continues until such time as the property is valued and the petitioner given her half share.

The question is whether it should be taken into account in determining the portion to be awarded to the respondent or to be awarded as a separate item as the learned judicial commissioner (as he then was) had done.

I must admit that I have some difficulty in answering this question. On the one hand, I must bear in mind that the function of the court is to divide the matrimonial assets, not to do an accounting of the income of the spouses during the marriage. A person who buys property should be able to enjoy it and not to be treated as a simple tenant in his own house. It is true that the appellant did not have to move into the apartment if he did not want to but clearly, he moved out of the matrimonial home because the marriage was already breaking down. And, if he had not moved into the apartment, it could have been rented out. But the respondent too was not prevented from moving into the apartment had she wanted to. If she did not, most probably, it was for the same reason why the appellant moved out of the matrimonial home: the marriage was breaking down.

On the other hand, there is the period after the marriage was dissolved until the apartment is valued and the respondent's entitlement is fully paid to her, during which period the appellant alone stays at the apartment to the exclusion of the respondent.

It does not seem fair to me that that period should not be accounted for and the respondent should not be compensated for.

In the circumstances, without breaching the function of the court of dividing the matrimonial assets, a fair thing to do is to take into account the period prior to the dissolution of the marriage during which period the appellant stayed at the apartment as a factor in determining the portion that the respondent is entitled to. But, for the period after the dissolution of the marriage until the respondent's share is paid in full, a portion of the rental otherwise would be earned should be paid as a separate item to the respondent.

In the circumstances, in my view, taking all the factors into account, including the direct financial contribution by the respondent towards the purchase of the house (which was about 10%), the fact that the appellant must have utilized part of the rental shortfall exclusively for his own benefit, and the fact that he alone had lived at the apartment prior to the dissolution of the marriage, a reasonable division would be that the respondent is entitled to half the current value of the apartment. As the current value of the apartment is definitely more than the purchase price, both parties stand to gain from their investment.

In other words, I would confirm the order of the learned judicial commissioner (as he then was) that the apartment be valued by a qualified valuer to be agreed by both parties and after deducting a sum of RM90,000 (the redemption sum), the balance is to be divided equally and half of it be paid in cash to the respondent. However, in coming to our conclusion, I would differ from the learned judicial commissioner (as he then was) in that I take into account two factors ('rental shortfall' and 'occupation rent') on which the learned judicial commissioner (as he then was) made separate awards.

Rental shortfall

I do not think that it is necessary to repeat my discussion of this issue. For the reasons that I have given I do not think it is correct that it should be given as a separate award.

Occupation rental prior and subsequent to the dissolution of the marriage

Similarly, for the reasons that I have given above, I do not think that there should be a separate award for occupation rental prior to the dissolution of marriage. However, half the occupation rental from the date of the dissolution of the marriage until the respondent's half share of the value of the apartment is paid in full to her, must be paid to the respondent.

Klinik Inter-Med

The facts of the case were dealt with by the learned judicial commissioner (as he then was) under two headings, first under the heading 'The Facts' and subsequently under the heading 'Courts' Findings'. The facts, as found by the learned judicial commissioner (as he then was) under 'Court's Findings' are quite brief compared to the facts narrated under the heading 'The Facts'. They lack the details enumerated under the heading 'The Facts'. I do not know what the findings of the learned judicial commissioner (as he then was) regarding them were. However, I must add that the facts as found by the learned judicial commissioner (as he then was) and narrated under the heading 'Courts Findings' are quite sufficient to show the extent of the respondent's contribution towards the establishment and the running of the clinic. I accept his findings of facts which is now reproduced for easy reference:

> The clinic was opened during the subsistence of the marriage. The petitioner had testified that she had contributed towards the opening of the clinic. She had arranged for the banking facilities and even stood as a guarantor. When they were in need, even the family car, the Mazda, was sold to tide over the difficult period. The respondent admitted that about RM10,000 of their savings had been utilized in the opening of the clinic. Furthermore, there was clear evidence that during the initial years the respondent stopped contributing towards the household expenses. The respondent had no rental payments to worry about as the house provided to the petitioner by KTM resolved that issue. All the while the petitioner was working and continued working even when the clinic was doing well. In other words the petitioner

A contributed financially and physically in the setting up of the clinic, thereby enabling the respondent to devote his energy to the running of the clinic.

But, what the learned judicial commissioner (as he then was) did was to do an accounting of the net income supposedly earned by the clinic and awarded $^1/_3$ of it to the respondent, at a rounded figure of RM200,000.

B Here again, I am faced with the question of the approach that the court should take: to do an accounting of past income or divide the existing asset. I prefer the second approach, in view of the provisions of s 76 of the Act. I see the difficulty that the learned judicial commissioner (as he then was) was facing in trying to determine the income supposedly earned by the clinic. The income declared to the Department of Inland Revenue, and C relied on by the appellant is one thing. The income the respondent claimed that the appellant had earned is another. The income, the expenses and the net income the appellant is supposed to have earned per year is actually no more than an arbitrary figure. Then there is the question of income tax that has not been paid on the net income found by the court which is more than D the income declared to the Department of Inland Revenue. The respondent says that as the appellant had not paid that tax (again an arbitrary figure), she is entitled to it. On the other hand, the appellant says that since that is the tax that he should pay, he is entitled to it. The point is, if that amount, as found by a court is tax, then neither of them is entitled to it. It is the Government of Malaysia that is entitled to it.

E Furthermore, I do not think that it can be denied that income earned from the clinic since its opening had not somehow been spent and enjoyed by the family, even though no one knows and I do not think it can be expected to be proved by either party, how much or in what proportion.

In the circumstances, I am of the view that the correct approach is to F divide the asset, not to apportion past income which is no more than an arbitrary figure arrived at based, as in this case, on mere assertions of interested parties.

So, the clinic, including all its equipment and goodwill should be valued by a qualified valuer to be agreed by both parties and $^1/_3$ of the value be paid in cash to the respondent. As it will take time to finalize and for payment to G be made, a fair solution is to order the respondent to pay interest at 4% (taking into account the current rate of interest on fixed deposits) on the amount of the $^1/_3$ share the respondent is entitled to. The interest should run from the date of the judgment of the High Court until the full amount is paid.

H In the circumstances, I would allow the appeal and make the following orders:

(a) The Crescent Court Apartment — The order of the learned judicial commissioner (as he then was) is confirmed in that the apartment be valued by a qualified valuer to be agreed by both parties and after I deducting the redemption sum of RM90,000, the balance is to be divided equally and half of it is to be paid in cash to the respondent.

(b) Rental shortfall — no separate award.

(c) Occupation rental prior and subsequent to the dissolution of marriage — no separate award for occupation rental prior to the dissolution of marriage. However, half the occupation rental from the date of the dissolution of marriage until the respondent's half share of the value of the apartment is paid in full to the respondent, is to be paid to the respondent.

(d) Klinik Inter-Med — the clinic, including all the equipment and goodwill to be valued by a qualified valuer to be agreed by both parties and $^1/_3$ of the value be paid in cash to the respondent. Interest of 4% on the amount of the $^1/_3$ share of the respondent to be paid to the respondent from the date of the judgment of the High Court until the full amount is paid.

(e) Liberty to apply for consequential orders for the carrying of these orders which may be made to the same High Court, even though not before the same judge.

(f) Each party to pay his/her own costs. Deposit to be refunded.

My learned brothers KC Vohrah and Alauddin Mohd Sheriff JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by D Sivalingam